83-1017

No. 83-

UNITED STATES SUPREME COURT

October Term 1983

PAUL BOHRER,)
)
Petitioner,)
)
v.)
)
HANES CORPORATION, et al.,)
)
Respondents.)

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. Under what circumstances, if any, is a judgment notwithstanding the verdict proper in an age discrimination case where the jury's determination of the fact of unlawful employer motivation is based on substantial evidence of discrimination and an assessment of the credibility of testimonial evidence on the issue of pretext?

II. Under what circumstances, if any, are the federal courts empowered to grant a judgment notwithstanding the verdict in the absence of a motion for a directed verdict at the close of all the evidence as explicitly required by the Fed.R.Civ.Proc. 50?

PARTIES

The parties to this proceeding are Paul Bohrer, Hanes Corporation and Hanes Hosiery, Inc., a division of Hanes Corporation. Consolidated Foods, Inc., the parent of Hanes Corporation, an original defendant in the district court, was dismissed as a party on its motion for summary judgment and was not a party in the proceeding in the court of appeals.

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PETITION FOR WRIT OF CERTIORARI
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Petitioner Paul Bohrer respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 23, 1983.

OPINIONS BELOW

The decision of the court of appeals is reported at 715 F.2d 213 and appears at pp. A-1 - A-21 of this petition. The

judgment of the district court is not reported and is set out at pp. A-22 - A-26.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1983. This petition is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

United States Constitution, Amendment 7:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than acaccording to the rules of the common law.

29 U.S.C. § 623(c)(2):

> In an action brought under paragraph (1) a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

Rule 50(b), Federal Rules of Civil Procedure, 28 U.S.C.:

> (b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

STATEMENT OF THE CASE

Plaintiff Paul Bohrer brought this action in the United States District Court for the Western District of Texas on April 5, 1979, alleging that his employment as a salesman had been terminated by the defendants because of his age in violation of the Age Discrimination in Employment Act of 1967, as amended ("ADEA"), 29 U.S.C. §§ 621 et. seq. The basis for jurisdiction in the district court was 29 U.S.C. § 626(d) and 28 U.S.C. § 1337.

The case was tried with a jury between March 2 and 9, 1982. Plaintiff and seven other witnesses testified during the first three days of trial. At the close of plaintiff's case the defendants moved for a directed verdict, and the district court reserved its ruling. The defendants thereupon presented six live witnesses and four deposition witnesses during the next

two and one-half days. After the defendants rested plaintiff presented his rebuttal case on March 8 and 9, 1982 and thereafter rested. The defendants did not renew their motion for a directed verdict either at the end of their own case or at the time plaintiff rested his case after rebuttal. The district court then permitted the defendants to present a further witness after which both parties closed their cases again. The defendants did not make a motion for a directed verdict at the close of all the evidence.

The district judge then instructed the jury and submitted the case to the jury on March 9, 1982 without any reservation. The jury thereafter rendered a verdict in plaintiff's favor by answering three special interrogatories. This verdict was received on March 9, 1982.

On March 22, 1982 the defendants

moved for a judgment notwithstanding the verdict or in the alternative for a new trial. On June 2, 1982 the district court granted defendants' motion for a judgment notwithstanding the verdict and denied all other motions, including defendants' alternative motion for a new trial (A-22 - A-26).

Plaintiff filed a timely appeal to the United States Court of Appeals for the Fifth Circuit which affirmed the district court's entry of a judgment notwithstanding the verdict on September 23, 1983 (A-1 - A-21).

Paul Bohrer was 56 years old when he was fired by the defendants on April 18, 1978. He had been selling Hanes hosiery products for approximately 25 years, first on the payroll of Texas Hosiery Company, formerly the Hanes distributor in Texas, and then on the payroll of the defendants

who took over distribution of their own products in Texas in January of 1977.

At trial plaintiff made out a prima facie case by demonstrating that he was within the protected age category, that he was replaced by an employee who was at that time 28 or 29 years old and that he was qualified to perform his job. The defendants articulated as the major reasons for plaintiff's discharge his failure to meet sales quotas, his inability to make timely reports and his inability to make sales calls on non-traditional accounts. To prove that the defendants' explanation was pretextual, plaintiff's evidence, both on rebuttal and in his case-in-chief, discredited defendants' reasons for discharging him and showed affirmatively that the defendants were motivated by plaintiff's age when they fired him.

As to discriminatory motive, the evi-

dence showed that younger employees who were late with reports and behind on quotas were excused and not threatened with dismissal. Younger employees were permitted to leave employment by "mutual agreement", but only plaintiff and another employee over the age of 40 were discharged outright. Younger employees were given repeated chances to amend their conduct, but plaintiff was summarily discharged. Defendants cut plaintiff's sales territory drastically when they took over the distribution of their products and billed plaintiff's replacement in the cut territory as a "young man" in a letter to a customer. Finally, plaintiff introduced evidence showing that when the defendants took over the distribution of their own products on January 1, 1977, 67 percent of the personnel selling Hanes products were over the age of 40; yet, eighteen months

later, just after plaintiff's discharge, only 21 percent of the sales force was over the age of 40.

Plaintiff also sought to discredit each of the defendant's articulated reasons for the discharge. First, plaintiff offered evidence controverting the sales quota rationale. When defendants cut plaintiff's territory and accounts, they did not reduce plaintiff's sales quotas commensurately. In fact, these quotas were dramatically increased despite the reduction in accounts. In October of 1977 plaintiff was told that he had to get his sales up. He understood that he was to give top priority to meeting his sales quotas. Despite further cuts in territory and accounts, plaintiff's sales for the first quarter of 1978 were 60 percent greater than for the first quarter of 1977 and fulfilled more than 26 percent of his

sales quota for all of 1978.

Second, the testimony at trial was in dispute as to plaintiff's compliance with reporting requirements except for a so-called management report. As to that report the evidence showed that it had formerly been done by plaintiff's supervisors at Texas Hosiery Company, and plaintiff consequently asked for help on the report from his immediate supervisor at Hanes, Dorlan "Pat" Johnson. Johnson did not help him with the report; yet, plaintiff was half-finished with the report at the time of his discharge. Moreover, plaintiff understood that getting this report finished was less important than his selling efforts. Finally, as noted above, younger employees who had been repeatedly late with other reports were not threatened with discharge.

Third, as to plaintiff's inability to

call on non-traditional accounts (such as book stores, drugstores and grocery stores), the conflict between Pat Johnson's testimony and plaintiff's testimony was particularly acute. Johnson, in fact, originally told the jury that plaintiff had flatly told him that he would not call on these accounts, but Johnson retracted that testimony on cross-examination. The defendants' testimony essentially was that plaintiff was consistently told to call on these accounts but refused to do so. Plaintiff's testimony was that the first written notice he received on this subject was only about three months prior to his discharge and that he intended to pursue these accounts as soon as his other work let up, but that he was fired before he was able to do so. Plaintiff also introduced evidence that as late as October of 1977 none of the salesmen had called on these accounts, that

plaintiff had been told that making his sales quota was the most important task he had and that as late as February of 1978 the defendants were threatening plaintiff in writing about making his sales quota, not about calling on these accounts. Finally, the evidence showed that in all of Texas out of approximately $8 million in sales, not more than $3500 anually were made to these non-traditional accounts.[1]

As indicated by the following excerpt from the trial transcript, the district court correctly recognized as a credibility contest the ultimate factual issue of what actually motivated the discharge:

> THE COURT: It is a contest between Mr. Bohrer and Mr. Johnson. That is just

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1 Other less vital reasons for the discharge were articulated by the defendants and similarly controverted by the plaintiff. The recitation of the evidence in the text is sufficient for this Court's consideration of the questions presented. Rule 21.1(g), Sup. Ct. Rules

about it.

MR. MYERS: No sir. It is a contest between Mr. Bohrer and every other sales representative in the state of Texas and we are going to bring everyone of them down here to tell that jury that that man is not telling the truth on the stand when he speaks on some of these subjects. We are going to have to bring them all down. It is going to take us awhile to do it, and Mr. Liebes is going to have to testify, too. I would like to move things along, more than willing to do so.

THE COURT: That may be true --

MR. MYERS: Right now you are saying, they tried to paint Pat Johnson to be a bad guy.

THE COURT: He is the one that did it, see. His motivation is in question in this case. It is his motivation. He is the key witness, period. You have record after record after record. It is all documented. The question now is going to be: Who is telling the truth, Mr. Bohrer or Mr. Johnson. I am assuming Mr. Johnson will say what you represent he will say.

MR. MYERS: He will. . . .

THE COURT: We are going to accommodate the lawyers in the case. I am not trying to tell the lawyers and the litigants that they are not entitled to put on their full case. They are, but I am in the middle and can use my lung power to tell you and to give you ideas. The jury can't, but they are people and I

think those people just understand that it is going to be a credibility contest between Mr. Bohrer and Mr. Johnson, pure and simple, and I think those people would like to hear those two witnesses and then let the lawyers go from there. That is my suggestion to you, fellows, about the way to get the case moving. It will highlight for you what the points of difference are between the two very, very clearly and sure let the jury understand it. (T-426-27).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW AFFIRMING A JUDGMENT NOTWITHSTANDING THE VERDICT IMPERMISSIBLY ALLOWS RE-EXAMINATION OF THE FACT OF DISCRIMINATION FOUND BY THE JURY, CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AND DEPARTS SO FAR FROM THE ACCEPTED COURSE OF RULE 50 PROCEEDINGS THAT IT SUBVERTS THE MEANS CHOSEN BY CONGRESS TO ENFORCE THE ADEA.

The uninhibited use of a judgment notwithstanding the verdict as a jury control device in this age discrimination case warrants this Court's plenary consideration. The decisions below permitting redetermination of the jury's finding of fact of employer motivation--a finding based on substantial evidence of discrimination and the jury's credibility resolution of conflicting testimony about pretext--violates plaintiff's rights under the ADEA and the Seventh Amendment, conflicts with prior decisions of this Court and other courts of appeals and undermines the means selected by Congress to deal with the prob-

lem of age discrimination in private sector employment.

The prior decisions of this Court make plain that the ultimate issue of intent to discriminate is a "pure question of fact". Pullman-Standard v. Swint, 456 U.S. 273 (1982) (intention to discriminate because of race under 42 U.S.C. § 2000e-2). See also Dayton Bd. of Education v. Brinkman, 443 U.S. 526 (1979) (intent to maintain racially segregated school system under Fourteenth Amendment). Cf. Commissioner v. Duberstein, 363 U.S. 278 (1960) (donative intent under § 22 of 1939 Internal Revenue Code). As this Court noted in Swint:

> "[D]iscriminatory intent is a finding of fact to be made by the trial court; it is not a question of law and not a mixed question of law and fact. . . Discriminatory intent here means actual motive . . . ." 456 U.S., at 289-90.

On the question of what actually moti-

vated Hanes to fire Paul Bohrer, therefore, plaintiff was entitled to have the jury's definitive answer under both the ADEA, 29 U.S.C. § 623(c)(2), and the Seventh Amendment.

The decision of the courts below exemplifies use of a jury control device in violation of both the Seventh Amendment and the ADEA. In this case the Fifth Circuit, like the district court, weighed for itself the credibility of witnesses for both sides on the key issue of whether the defendants' proffered reasons for plaintiff's discharge were pretextual. Notwithstanding the district court's correct assessment of the case as a credibility contest, both of the courts below made an independent credibility determination different from the one made by the jury. Moreover, the Fifth Circuit wholly ignored the substantial evidence of discrimination plaintiff intro-

duced at trial, both in his case-in-chief and on rebuttal.[2] In a meaningful sense, therefore, the courts below re-examined the fact of employer motivation tried by the jury in violation of the Seventh Amendment and the expressed intent of Congress in the ADEA. Jury control devices were never intended to be, nor could they constitutionally be, so used. Galloway v. U.S., 319 U.S. 372, 395-96 (1943). This Court should exercise its power of supervision to clarify the circumstances in which such devices may be used in age discrimination cases.

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2 Indeed, the Fifth Circuit even remarked in its opinion that plaintiff offered no rebuttal evidence, whereas the fact is that plaintiff offered a considerable amount of rebuttal evidence followed by some rejoinder evidence by the defendant. The opinion of the court of appeals, therefore, betrays an unwillingness to make a proper determination of the sufficiency of the evidence under Fed.R. Civ.Proc. 50(b).

The decisions below also conflict with the decisions of other courts of appeals faced with credibility determinations of employer motivation in age discrimination cases. The Sixth, Seventh, Eighth and Ninth Circuits embrace a rule of minimum interference with jury determinations of employer motivation in age discrimination cases, particularly when the credibility of witnesses is involved. Rose v. Nat. Cash Register Corp., 703 F.2d 225 (6th Cir. 1983); Syvock v. Milwaukee Boiler Mfg. Co., Inc., 665 F.2d 149 (7th Cir. 1981); Tribble v. Westinghouse Electric Corp., 669 F.2d 1193 (8th Cir. 1982); Jackson v. Shell Oil Co., 702 F.2d 197 (9th Cir. 1983). But see Halsell v. Kimberly-Clark Corp., 683 F.2d 285 (8th Cir. 1982). Cf. Sweat v. Miller Brewing Co., 708 F.2d 755 (11th Cir. 1983) (denial of summary judgment where issue of pretext is controverted).

On the other hand, the Fourth and Fifth Circuits have used jury control devices to supplant jury findings of employer motivation when the courts have disagreed with the juries about the reasonable probability of inferences drawn from disputed testimony. E.g., Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1982); Smith v. Flax, 618 F.2d 1062 (4th Cir. 1980). See also Massarky v. General Motors Corp., 706 F.2d 111 (3rd Cir. 1983).

In view of the sharp conflict among the courts of appeals on the important question of the deference owed to jury findings of motivation in age discrimination cases, the Court should grant certiorari to clarify the manner in which Rule 50 may be applied to these cases.

The decisions below also conflict with the "essential requirement" set forth by this Court regarding the use of jury con-

trol devices in Galloway v. U.S., supra:

> "[T]he essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." 319 U.S., at 395.

The courts below paid no heed to this standard when they drew their own inferences from the evidence and failed to consider "all reasonably possible inferences" favoring plaintiff's evidence as to why he was fired. The Fifth Circuit's cavalier approach to jury findings of fact also contrasts sharply with this Court's recent decision in Pullman-Standard v. Swint which requires appropriate deference to the fact finder. This Court should grant certiorari to ensure that the trial courts and courts of appeals do not continue to depart from the "essential requirement" for using jury control devices, particularly where credibility resolutions about human

motivation are so prevalent.

There is a further special and important reason for granting certiorari in this case. The decision below, and the decisions of other trial and appellate courts which have permitted the use of judgments notwithstanding the verdict in age discrimination cases where issues of credibility are critical, directly and substantially undermine the means chosen by Congress to address age discrimination in employment. This Court determined in Lorillard v. Pons, 434 U.S. 575 (1978), that in enacting the ADEA Congress carefully selected the procedures for enforcing the act, and that "in a private action under the ADEA a trial by jury would be available where sought by one of the parties." 434 U.S., at 585. Prior to this Court's decision in Lorillard, a bill to amend the ADEA was introduced in the Senate. Senator Kennedy proposed an amendment which

would expressly provide for jury trials in ADEA cases. the Kennedy amendment was adopted by the Senate without debate. After Lorillard, Congress passed the Kennedy amendment (as modified to include claims for liquidated damages). 29 U.S.C. § 623(c)(2). The stated rationale for the Kennedy amendment was that juries "are more likely to be open to the issues which have been raised by the plaintiffs. . . . [and that they] may be more neutral in such circumstances." 123 Cong.Rec. 34318 (1977).[3]

In view of the unmistakable direction by Congress that juries determine the factual issue of employer motivation in private and non-federal age discrimination cases, the uninhibited use of jury control

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3 This legislative history appears in the majority and dissenting opinions in Lehman v. Nakshian, 453 U.S. 156, 167-69 and 178-79 (separate opinion) (1981).

devices, as exemplified by the present case, calls for an exercise of this Court's supervisory power to ensure that the trial and lower appellate courts do not continue to redetermine factual issues settled by juries in these cases and thereby depart from the accepted and usual course of proceedings twice mandated by Congress.

In summary, this case is representative of the thousands of age discrimination cases in which the differences between the employer and employee boil down to a dispute over what actually motivated the employer's decision to discharge the employee. In this case, like many others, the employer proffered a legitimate business reason for the discharge and supported it by a parade of witnesses. Here the employee offered substantial evidence of discriminatory motivation (unequal treatment of similarly situated younger and older em-

ployees, statistical showing of a "youth movement" and other overt manifestations of age bias) as well as substantial evidence tending to discredit the legitimacy of the reasons for discharge articulated by the employer. The jury in this case assessed the credibility of the many witnesses and ultimately found as a fact, by a special interrogatory addressed to it, that plaintiff's age "was a determining factor" of his discharge. The redetermination of this fact to the contrary conflicts with decisions in four other circuits and departs from the "essential requirement" for using Rule 50 set forth by this Court in Galloway. To the extent that this redetermination was premised on the often expressed view that juries should not be permitted to speculate, this Court squarely rejected that rationale in Lavender v. Kurn, 327 U.S. 645, 653 (1946):

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

In light of the increasing number of age discrimination cases being tried, the lack of a uniform and appropriate standard for granting Rule 50 motions and the substantial erosion of the means chosen by Congress to enforce the ADEA, certiorari should be granted to examine the circumstances in which such devices may properly be used under the ADEA and the Seventh

Amendment.

II. THE DECISION BELOW AFFIRMING A JUDGMENT NOTWITHSTANDING THE VERDICT IN FAVOR OF A PARTY WHO FAILED TO MOVE FOR A DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AND WITH APPLICABLE DECISIONS OF THIS COURT, VIOLATES THE SEVENTH AMENDMENT, AND DEPARTS SIGNIFICANTLY FROM ACCEPTED TRIAL PROCEDURES.

Certiorari should be granted to determine when, if ever, a party who fails to move for a directed verdict at the close of all the evidence, as explicitly required by Rule 50(b), may thereafter constitutionally obtain a judgment notwithstanding the verdict. The courts of appeals are sharply divided on this question, and the decisions below conflict with applicable decisions of this Court. At stake is an important matter of constitutional law with broad practical implications for trial lawyers in the federal courts.

The court of appeals in this case

frankly acknowledged that its decision to adopt a "flexible approach" to Rule 50 and "excuse defendants' technical noncompliance" with Rule 50(b) conflicts with decisions of the First and Third Circuits. Martinez Moll v. Levitt & Sons of Puerto Rico, Inc., 583 F.2d 565 (1st Cir. 1978); DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193 (3rd Cir. 1978).[4]

Rule 50 unequivocally requires a motion for a directed verdict to be made at the close of all the evidence as a prerequisite to granting a judgment notwithstanding the verdict. This is no mere technical

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4 Compare also Oliveras v. Am. Export Isbrandtsen Lines, Inc., 431 F.2d 814 (2d Cir. 1970); Lowenstein v. Pepsi-Cola Bottling Co. of Pennsauken, 536 F.2d 9 (3d Cir. 1976) with Miller v. Premier Corp., 608 F.2d 973 (4th Cir. 1979); Bonner v. Coughlin, 657 F.2d 931 (7th Cir. 1981); Bachtel v. Mammoth Bulk Carriers, Ltd., 605 F.2d 438 (9th Cir. 1979); Splitt v. Deltona Corp., 662 F.2d 1142 (11th Cir. 1981).

requirement, for the directed verdict motion at the close of all the evidence is the predicate for the "fiction" supplied by Rule 50(b) that "the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion". The constitutionality of a judgment notwithstanding the verdict is thus dependent on scrupuluous obedience to the procedural requirements of the rule. Therefore, whether the "flexible approach" of the courts below or the more scrupulous approach of other courts of appeals applies to Rule 50(b) motions is a matter of constitutional import meriting the full attention of this Court.

The decision of the courts below also conflicts with this Court's prior construction of Rule 50(b) in Johnson v. New York New Haven & Hartford R. Co., 344 U.S. 48 (1952). This Court in Johnson found that

the requirements of Rule 50 were part of a "procedural program" for federal court jury trials in which the rule "carefully sets out the steps and procedures to be followed by the parties as a prerequisite to" judgments notwithstanding the verdict. 344 U.S., at 51-52. In holding that a party's failure to request a judgment in its favor (in addition to setting aside a verdict against it) deprived the trial court of power to grant a judgment notwithstanding the verdict, this Court observed that the rule is not difficult to understand, and that: "Rewriting the rule to fit counsel's unexpressed wants and intention would make it easy to introduce the same type of confusion and uncertainty the rule was adopted to end." 348 U.S., at 53. Similarly, the decision of the courts below construing the rule to fit the unexpressed intention of defense counsel introduces con-

fusion and uncertainty of the same sort which this Court sought to eliminate in Johnson. Because the decision below thus departs so far from the accepted and usual course of proceedings under Rule 50, this Court should exercise its power of supervision by clarifying the circumstances in which judgments notwithstanding the verdict may constitutionally be rendered.

Finally, clarification by this Court of how the procedural requirements of Rule 50(b) are to be applied is important to the federal courts' trial bar. The decision of the courts below and those decisions in other circuits adopting the "flexible approach" encourage a slovenly attitude toward the precise requirements of the Federal Rules of Civil Procedure and thereby erode the underlying mandate of the Seventh Amendment. Given the recent call for more competent trial counsel in

the federal courts, the decision of the courts below excusing "technical noncompliance" with important procedures appears all the more inexplicable.[5]

In summary, because the decision of the Fifth Circuit violates plaintiff's rights under Rule 50(b) and the Seventh Amendment and conflicts with decisions in other circuits and with prior decisions of this Court, and because the trial bar in the federal courts needs clear direction from this Court as to the proper approach to Rule 50(b) motions, this Court should grant certiorari to review the circumstances in which a judgment notwithstanding the verdict can be granted in the absence of a motion for a directed verdict at the close of all the evidence.

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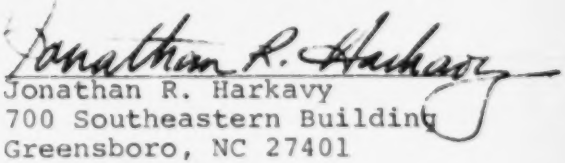
5 The rule 50(b) motion in this case also was not timely and could have been rejected on that ground, as plaintiff urged below.

CONCLUSION

For all of these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 82-1314

Paul BOHRER,)
)
Plaintiff-Appellant,)
)
v.)
)
HANES CORPORATION,)
et al.)
)
Defendants-Appellees.)

September 23, 1983

Appeal from the United States District Court for the Western District of Texas.

Before POLITZ and JOLLY, Circuit Judges, and STAGG*, District Judge.

POLITZ, Circuit Judge:

Paul Bohrer brought suit under the Age Discrimination in Employment Act

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*District Judge of the Western District of Louisiana, sitting by designation.

(ADEA), 29 U.S.C. § 621 et seq., alleging that defendants Hanes Corporation and its division, Hanes Hosiery, Inc.,[1] had reduced his sales territory[2] and later terminated his employment because of age. A jury returned a special verdict finding that age was a determinative factor in Bohrer's discharge, that this discriminatory act was willful, and that Bohrer was entitled to damages in the amount of

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1 Another defendant, Consolidated Foods, Inc., was dismissed as a party-defendant on its motion for summary judgment. To facilitate discussion, Hanes Corporation and its division, Hanes Hosiery, Inc., shall be collectively referred to as "Hanes."

2 Pursuant to a general expansion program inaugurated by Hanes in January of 1978, the sales territories assigned to plaintiff and other sales personnel were realigned. Salesmen both within and without the parameters of the protected class (ages 40 to 70) lost accounts in this process. Counsel for plaintiff withdrew the claim of discriminatory reduction in sales territory during the charge conference.

$167,320. Acting on defendants' motion for judgment notwithstanding the verdict, the district court entered judgment in favor of defendants. Finding no reversible error in the district court's disposition of the case, we affirm.

Facts

Bohrer had been employed as a salesman for over 20 years by the Texas Hosiery Company, a small, family-owned business which served as Hanes' exclusive distributor in southern Texas, when in January 1977 Hanes assumed direct responsibility for the marketing of its products. Hanes extended offers of employment to plaintiff and several other Texas Hosiery employees. Bohrer, then 55 years old, accepted a sales position.

Although plaintiff achieved moderate success in meeting his sales quotas, his performance in other areas deemed impor-

tant by the employer was markedly deficient. Specifically, plaintiff consistently failed to prepare reports known as "management reviews," designed to advise major retail accounts of the status of their sales of defendants' merchandise and to suggest methods to improve sales, to aggressively solicit as customers such nontraditional retail outlets as college bookstores, drugstores and supermarkets, to take adequate inventories in stores which he serviced on behalf of Hanes and to maintain stock control books, to respond to company requests for "fast track" reports which enabled it to monitor the results of sales promotions of six hosiery items during 1977, and to correctly complete weekly "call" reports informing management of his travels and accomplishments during the week. Hanes received repeated complaints from one of Bohrer's

three major retail accounts, Joske's Department Store.

On various occasions during the first eight months of 1977, Bohrer was admonished to correct the deficiencies noted. A counseling session between plaintiff and his immediate supervisor, Dorlan Johnson, and Harold Liebes, Hanes' general field sales manager was ultimately held on October 3, 1977. In the course of this meeting, Bohrer was warned to increase sales and to otherwise fulfill Hanes' requirements with respect to the compilation of reports, servicing of accounts, participation in sales promotions programs, and conduct of inventories. Bohrer acknowledged the validity of the employer's criticisms, and expressly resolved to comply with management's goals and directives.

In early 1978, however, Bohrer's

superiors again complained of his job performance. A sales representative review outlined plaintiff's continued refusal to adhere to any company policy or management instruction with which he disagreed. Johnson and Liebes subsequently met with plaintiff on April 18, 1978, for the purpose of discussing the adverse findings contained in the review. At the conclusion of this discussion Bohrer was discharged. He was replaced by a 28-year-old man.

Bohrer now contends that the trial judge erred both in entertaining the motion for judgment n.o.v. and in granting it. The former challenge is based on defendants' failure to move for a directed verdict at the close of the evidence as requried by Fed.R.Civ.P. 50(b), which prescribes that "a party who has moved for a directed verdict may move to

have the verdict and any judgment thereon set aside and to have judgment entered in accordance with his motion for a directed verdict. . . ." The latter is based on the evidence adduced at trial. We find neither challenge sufficient for reversal.

Procedural Requirements

Rule 50(b) of the Federal Rules of Civil Procedure precludes a district court from entertaining a motion for judgment notwithstanding the verdict unless the movant has first sought a directed verdict after presentation of all the evidence. See Perricone v. Kansas City Southern Ry. Co., 704 F.2d 1376 (5th Cir.1983); 5A J. Moore & J. Lucas, Moore's Federal Practice ¶50.08 (2d ed. 1982). Where this prerequisite has not been satisfied, a party cannot later challenge the sufficiency of the evidence either through a j.n.o.v. motion or on appeal. Myers v.

Norfolk Livestock Market, Inc., 696 F.2d 555 (8th Cir.1982); (citing Rawls v. Daughters of Charity of St. Vincent DePaul Inc., 491 F.2d 141 (5th Cir.), cert. denied, 419 U.S. 1032, 95 S.Ct. 513, 42 L.Ed.2d 307 (1974)). A litigant who has moved for a directed verdict at some point prior to the conclusion of trial, but failed to renew the motion at the close of all the evidence, is thus held to have waived the right to move for judgment non obstante veredicto. Bonner v. Coughlin, 657 F.2d 931 (7th Cir.1981); Smith v. University of North Carolina, 632 F.2d 316 (4th Cir.1980); 5A J. Moore & J. Lucas, Moore's Federal Practice at ¶50.08. This rule serves two essential purposes: to enable the trial court to re-examine the question of evidentiary insufficiency as a matter of law if the jury returns a verdict contrary to the movant, and to

alert the opposing party to the insufficiency before the case is submitted to the jury, thereby affording it an opportunity to cure any defects in proof should the motion have merit. See Halsell v. Kimberly-Clark Corp., 683 F.2d 285 (8th Cir.1982), cert. denied,--U.S.--, 103 S.Ct. 1194, 75 L.Ed.2d 438 (1983); see also Ohio-Sealy Mattress Co. v. Sealy, Inc., 585 F.2d 821 (7th Cir.1978), cert. denied, 440 U.S. 930, 99 S.Ct. 1267, 59 L.Ed.2d 486 (1979); Martinez Moll v. Levitt & Sons of Puerto Rico, Inc., 583 F.2d 565 (1st Cir.1978).

Some courts have strictly enforced Rule 50(b), see, e.g., Martinez Moll v. Levitt & Sons of Puerto Rico, Inc.; De-Marines v. KLM Royal Dutch Airlines, 580 F.2d 1193 (3d Cir.1978), whereas others have adopted a more flexible approach toward a party's noncompliance with its

terms. Myers v. Norfolk Livestock Market, Inc.; 5A J. Moore & J. Lucas, Moore's Federal Practice at ¶50.08; 9 C. Wright and A. Miller, Federal Practice and Procedure: Civil § 2537 (1971 & 1982 Supp.). See, e.g., Halsell v. Kimberly-Clark Corp.; Bonner v. Coughlin; Miller v. Premier Corp., 608 F.2d 973 (4th Cir.1979); Bachtel v. Mammoth Bulk Carriers, Ltd., 605 F.2d 438 (9th Cir.1979), overruled on other grounds, Brown v. American Mail Line, Ltd., 625 F.2d 221, 223 (9th Cir. 1980); Quinn v. Southwest Wood Prods., Inc., 597 F.2d 1018 (5th Cir.1979); Beaumont v. Morgan, 427 F.2d 667 (1st Cir.), cert. denied, 400 U.S. 882, 91 S.Ct. 120, 27 L.Ed.2d 121 (1970); Jack Cole Co. v. Hudson, 409 F.2d 188 (5th Cir.1969). Recognizing the liberal spirit imbuing the Federal Rules of Civil Procedure, Fed.R. Civ.P. 1, we agree with the Seventh Cir-

cuit's pronouncement that while:

> [I]t is certainly the better and safer practice to renew the motion for directed verdict at the close of all the evidence, . . ."[t]he application of Rule 50(b) in any case 'should be examined in the light of the accomplishment of [its] particular purpose[s] as well as in the general context of securing a fair trial for all concerned in the quest for truth.'"

Bonner v. Coughlin, 657 F.2d at 939 (quoting from Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d at 825).

With these principles in mind, we turn to the record before us. Once plaintiff rested, defendants moved for a directed verdict and asked the district court to reserve its ruling. At this juncture the court articulated its strong misgivings as to the adequacy of plaintiff's proof and the propriety of allowing the case to go to the jury. A tape recording of the April 4, 1978 termination meeting, made by Bohrer and played at defendants'

request following the close of plaintiff's evidence, evidently persuaded the court of the substantial likelihood that plaintiff had failed to establish a prima facie case or, if he did, that defendants had articulated a legitimate, nondiscriminatory reason for discharge. The court's comments at this point reflect a concern that the evidence did not pose a jury issue. Cognizant, however, of the stringency of this circuit's review of a directed verdict, and sensitive to the potential unfairness to the defendants were the case to be withdrawn from the jury's consideration and summarily reversed on appeal, the court determined to permit the case to go to the jury and announced that the motion would be taken under advisement. The court invited defendants to reurge their attack on the sufficiency of plaintiff's evidence "by motion for

judgment n.o.v. or motion at the close of the evidence."

After moving for a directed verdict, defendants introduced substantial evidence bearing on Bohrer's unsatisfactory job performance. Plaintiff offered no rebuttal. In setting aside the verdict and entering judgment for defendants, the trial judge observed that "the verdict returned by the jury is against the clear weight of the evidence, and if allowed to stand, would result in a miscarriage of justice," and "the evidence and reasonable inferences drawn therefrom point so strongly in favor of the Defendants that reasonable persons could not arrive at a verdict against the Defendants."

We excuse defendants' technical noncompliance with Rule 50(b) under the congruence of circumstances extant in this case because we are convinced that the

purposes of the rule have been served. To demand a slavish adherence to the procedural sequence and to require these defendants, in this case, to articulate the words of renewal once the motion had been taken under advisement, would be "to succumb to a nominalism and a rigid trial scenario as equally at variance as ambush with the spirit of our rules." Quinn v. Southwest Wood Prods., Inc., 597 F.2d at 1025.

The Merits

Having found that the district court properly considered the directed verdict motion, we review the merits thereof, applying the standard announced in Boeing v. Shipman, 411 F.2d 365 (5th Cir.1969) (en banc):

> a motion for . . . judgment n.o.v. should be granted only when the facts and inferences point so strongly and overwhelmingly in favor of the moving party that reasonable persons could not

> arrive at a contrary verdict. The court should consider all of the evidence--not just that evidence which supports the nonmovant's case--but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If there is substantial evidence . . . of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions, the motion should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. A motion for . . . judgment n.o.v. should not be decided by which side has the better of the case, nor should the motion be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of fact, and not the court, to weigh conflicting evidence and inferences, and to determine the credibility of witnesses.

Maxey v. Freightliner Corp., 665 F.2d 1367, 1371 (5th Cir.1982) (en banc) (citation omitted).

It is axiomatic that the elements of a Title VII prima facie case, as outlined in McDonnell-Douglas Corp. v. Green, 411

U.S. 792, 93 S.Ct. 1817, 1819, 36 L.Ed.2d 668 (1973), appertain to suits arising under the ADEA. Reeves v. General Foods Corp., 682 F.2d 515 (5th Cir.1982); Williams v. General Motors Corp., 656 F.2d 120 (5th Cir.1981). In order to establish a prima facie showing of age discrimination, the plaintiff must demonstrate that he was a member of the protected class, was discharged and later replaced by a person outside the protected class, and was qualified to perform the job. Williams v. General Motors Corp.; Houser v. Sears, Roebuck & Co., 627 F.2d 756 (5th Cir.1980); Price v. Maryland Casualty Co., 561 F.2d 609 (5th Cir.1977). Where a case does not conform to the McDonnell formula, however, the trial court is free to deviate therefrom. Williams v. General Motors Corp.; McCorstin v. United States Steel Corp.,

621 F.2d 749 (5th Cir.1980).

Prima facie proof of age discrimination does not necessarily entitle the plaintiff to a jury determination of his claim. Such simply shifts to the defendant employer the burden of producing evidence of nondiscriminatory reasons for the discharge. Reeves v. General Foods Corp. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981). This burden is not one of persuasion, but one that may be sustained through the introduction of admissible evidence of an explanation that would be "legally sufficient to justify a judgment for the defendant." 450 U.S. at 255, 101 S.Ct. at 1094. If the employer offers proof which raises a genuine issue of fact as to whether it terminated the plaintiff for good cause, or on some basis other than

age, the presumption of discrimination engendered by plaintiff's initial evidence is dispelled.

Once the analysis reaches this "new level of specificity," id. at 255, 101 S. Ct. at 1095, it is incumbent upon the plaintiff to prove that the explanation proffered by the defendant for its employment action was a pretext or ruse designed to conceal a discriminatory motive. See Reeves v. General Foods Corp.; Smith v. Farah Mfg. Co., Inc., 650 F.2d 64 (5th Cir.1981). At this point the plaintiff again bears the burden of production, which now merges with the ultimate burden of persuasion that he has at all times retained. Texas Dept. of Community Affairs v. Burdine. To accomplish this objective, the plaintiff may either prove that age more likely motivated the employer, or discredit its articulated ra-

tionale. Id. See Haring v. CPC Int'l, Inc., 664 F.2d 1234 (5th Cir.1981).

Application of the rigorous Boeing standard to the case at bar convinces us that no jury should reasonably have concluded that age was a determinative factor in Hanes' decision to fire Bohrer. The record is replete with instances of Bohrer's deliberate violation of both company policies and management directives dating back to the beginning of his tenure. Whenever plaintiff disagreed with a particular rule or instruction, he simply refused to implement it. He was reprimanded on several occasions, and given ample opportunity, following the October 1977 conference, to take corrective measures. Although his sales record improved in early 1978, he continued to disregard such important requirements as the pursuit of nontraditional accounts,

the compilation of vital records and reports, and the inventory of Hanes products stocked by major retail customers. Any inference of discrimination which plaintiff may have raised was thus dissipated by defendants' proffered justification.

In considering whether defendants' articulated reason for Bohrer's firing was pretextual, we have examined the evidence in its entirety, including that relative to Bohrer's personality conflict with Johnson and his substantial compliance with sales quotas. In support of Bohrer's position we find essentially his testimony that he adjudged his performance adequate and that any necessary remedial action had been taken. Such proof, generally deemed inadequate by this court to establish pretext, see, e.g., Ford v. General Motors Corp.; Houser v. Sears,

Roebuck & Co., illustrates that it was Bohrer's fundamental disagreement with the manner in which his former employer operated its sales division, rather than his age, that eventually led to his dismissal. There was no proof that employees of any age with similar work records were accorded more favorable treatment.

The judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

PAUL BOHRER,	X	
Plaintiff,	X	
V.	X	CIVIL ACTION NO. SA-79-CA-131
HANES CORPORATION, ET AL.,	X	
Defendants.	X	

J U D G M E N T

On this day came on for consideration Plaintiff's proposed judgment and Defendants' Motion for a Judgment in Favor of Defendants Notwithstanding the Verdict, and in the alternative, for a New Trial.

On the 5th day of March, 1982, the above-entitled and numbered cause came on to be heard and came the Plaintiff, Paul Bohrer, in person, and by and through his attorney of record, and then came Defen-

dants, Hanes Corporation and Hanes Hosiery, a Division of Hanes Corporation, in person and by and through their attorneys of record, and all parties announced ready for trial;

Whereupon, a jury of six (6) good and lawful men and women were selected to try this cause, opening statements were made, the evidence developed and closed, Motion for instructed verdict was made by the Defendants and reserved by the Court, the Charge of the Court was prepared and read to the jury, closing arguments were completed and the jury retired to deliberate its verdict. Subsequently, on March 9, 1982, the jury returned its verdict in open Court in favor of the Plaintiff, Paul Bohrer.

Thereafter, on or about March 22, 1982, the Defendants filed their Motion for a Judgment in Favor of Defendants

Notwithstanding the Verdict, or in the Alternative, for a New Trial, and the Plaintiff submitted his proposed judgment, and all parties have since submitted numerous briefs on the subject to the Court.

The Court having carefully considered the evidence submitted during the trial of this cause, and the entire file hereon, is of the opinion and so finds that the verdict returned by the jury is against the clear weight of the evidence, and if allowed to stand, would result in a miscarriage of justice. The Court is of the further opinion that the evidence and reasonable inferences drawn therefrom points so strongly in favor of the Defendants that reasonable persons could not arrive at a verdict against the Defendants. The Court, being of the opinion that the Defendants' Motion for a Judgment in Favor of Defendants Notwith-

standing the Verdict is well taken, hereby sets aside the verdict of the jury and hereby enters Judgment in favor of the Defendants, Hanes Corporation and Hanes Hosiery, a Division of Hanes Corporation, and it is ORDERED, ADJUDGED and DECREED that the Plaintiff, Paul Bohrer, take nothing by way of his action over and against the Defendants, Hanes Corporation and Hanes Hosiery, a Division of Hanes Corporation, and Consolidated Foods, Inc.

It is further ORDERED that each party hereto shall bear its own Court costs, for which let execution issue, if not timely paid.

It is further, ORDERED that all other relief sought by and between the parties hereto, is hereby in all things DENIED.

IT IS SO ORDERED.

SIGNED and ENTERED this the 1 day of June, 1982.

s/
FRED SHANNON, United States District Judge

NO. 83-1017

In the

UNITED STATES SUPREME COURT

October Term 1983

PAUL BOHRER,

Petitioner,

v.

HANES CORPORATION, et al.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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(Continued)

CONSTITUTIONAL PROVISIONS, STATUTES, RULES

AUTHORITIES CITED
(Continued)

NO. 83-1017

In the

UNITED STATES SUPREME COURT

October Term 1983

PAUL BOHRER,	)
	)
Petitioner,	)
	)
v.	)
	)
HANES CORPORATION, et al.,	)
	)
Respondents.	)

BRIEF OF RESPONDENTS
IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

The respondents, Hanes Corporation and Hanes Hosiery, Inc., respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Fifth Circuit in this case. That opinion is reported at 715 F.2d 213 and appears in the appendix of the petition at pp. A-1 to A-21. The judgment of the United States District Court for the

Western District of Texas is set forth in the appendix of the petition at pp. A-22 to A-26.

STATEMENT OF THE CASE

The instant action was initiated by the plaintiff/petitioner, Paul Bohrer, alleging that, on or about April 18, 1978, he was discharged as a sales representative by the defendants/respondents, Hanes Corporation and Hanes Hosiery, Inc. Plaintiff alleged that the discharge was based solely upon his age (56 years in April of 1978) in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 626, et seq. (During the course of the trial, the plaintiff withdrew another issue as to the alleged discriminatory reduction of his sales territory.) The defendants denied that they had discriminated against the plaintiff as alleged and affirmatively asserted, among other things, that the plaintiff had been discharged for good

cause and based upon reasonable factors other than age.

This case proceeded to trial before a jury beginning on March 2, 1982. After the plaintiff rested, defendants moved for a directed verdict and, after argument thereon, asked the court to reserve its ruling. At that time the court advised the defendants that they could renew their motion as a motion for judgment notwithstanding the verdict or by motion at the close of the evidence. On March 9, 1982 the jury returned a verdict on special interrogatories finding that, from a preponderance of the evidence, the age of the plaintiff was a determining factor in the defendants' decision to terminate the plaintiff, that such discrimination was willful, and that the sum of $167,320.00 represented the plaintiff's damages. No judgment was subsequently entered on that verdict.

On March 22, 1982 defendants moved for a judgment in favor of the defendants

notwithstanding the verdict or, in the alternative, for a new trial. On June 1, 1982 the court, noting that a motion for instructed verdict had been made by the defendants and reserved by the court, granted defendants' motion for judgment in favor of the defendants notwithstanding the verdict on the basis that "the verdict returned by the jury is against the clear weight of the evidence, and if allowed to stand, would result in a miscarriage of justice" and "that the evidence and reasonable inferences drawn therefrom point so strongly in favor of the defendants that reasonable persons could not arrive at a verdict against the defendants."

The plaintiff appealed from that judgment to the United States Court of Appeals for the Fifth Circuit. After hearing arguments thereon, the Fifth Circuit affirmed the judgment of the District Court on September 23, 1983.

STATEMENT OF FACTS

The plaintiff/petitioner, Paul Bohrer, at age 55, began his employment with Hanes Hosiery on January 1, 1977 as a salesman. His employment continued until April 18, 1978. There was no formal employment agreement.

Mr. Bohrer had been previously employed by a family-run, relatively small business, known as Texas Hosiery, which was a distributor for Hanes Hosiery and other products. On January 1, 1977, the defendants took over responsibility for direct distributorship of its Hanes products and hired Paul Bohrer and others who were within the protected age class.

The defendants/respondents, as a international company, had a different management approach than had pertained at Texas Hosiery. In addition to merely selling hosiery products, the respondents had stringent requirements with respect to the submission of various reports, the servicing of accounts, the taking of inventories, and the making of new accounts. During

his tenure with Hanes Hosiery, the plaintiff consistently failed to file timely reports and in some instances failed to file important management reports at all. He failed to follow the instructions of his supervisors in this regard as well as failing to call on new, non-traditional accounts, such as drug stores, grocery stores, book stores, etc., as instructed by his superiors. Indeed, the plaintiff repeatedly questioned the directives of his employer. Plaintiff was counseled on numerous occasions regarding his failure to meet the company's requirements. Ultimately, at a meeting on April 18, 1978 with his superiors, he was again told of his failures to adhere to the defendants' policies, his bad attitude, and his failure to do the job which defendants felt needed to be done. In response, the plaintiff indicated his dislike for being given orders, and his unwillingness to follow the dictates of his employer. At that meeting, which was tape recorded by the plaintiff, the plaintiff's

employment relationship terminated. At that time the defendants had not selected any particular person to replace him.

REASONS FOR DENYING THE WRIT

As hereinafter indicated, this case does not satisfy this court's criteria for granting review by writ of certiorari as set forth in Rule 17 of the Rules of this Court.

1. The Decision of the Court Below Affirming a Judgment Notwithstanding the Verdict Does not Conflict with Decisions of This Court and other Courts of Appeals, Nor Does It Violate the Seventh Amendment of the Constitution of the United States or the Age Discrimination in Employment Act.

Petitioner argues that the Fifth Circuit takes a "cavalier approach to jury findings" which conflicts with the positions taken by other courts of appeals. A mere examination of the Circuit Court cases cited by the petitioner rebuts that position.

The Sixth Circuit Court of Appeals in the case of Rose v. National Cash Register Corporation, 703 F.2d 225 (6th Cir. 1983),

cited by the petitioner, affirmed the lower court's denial of the defense motion for a judgment notwithstanding the verdict (j.n.o.v.) or a new trial. The court said that a j.n.o.v. is precluded "when in viewing the evidence in the light most favorable to the non-moving party, it would permit a reasonable jury to find in favor of that party." 703 F.2d at 227. In Syvock v. Milwaukee Boiler Mfg. Co., Inc., 665 F.2d 149 (7th Cir. 1981), the Seventh Circuit affirmed the district court's denial of a defendant's motion for j.n.o.v. saying that "(a)fter having fairly reviewed the record we are satisfied that there was sufficient evidence from which a reasonable jury could find that Milwaukee Boiler discriminated against the plaintiff by reason of age" but that "(t)he same is not true, however, with respect to the jury's finding of willfulness." 665 F.2d at 154. In Tribble v. Westinghouse Elec. Corp., 669 F.2d 1193 (8th Cir. 1982), the Eighth Circuit upheld the district court's denial of a

defense motion for j.n.o.v. or a new trial. The Court said that a j.n.o.v. should be granted "'only when all the evidence points one way and is susceptible to no reasonable inferences sustaining the position of the non-moving party.'" 669 F.2d at 1195. The Court said denial of the motion is proper "'where the evidence presented allows reasonable men in a fair exercise of their judgment to draw different conclusions.'" 669 F.2d at 1196. The petitioner also cites the Eighth Circuit case of Halsell v. Kimberly-Clark Corp., 683 F.2d 285 (8th Cir. 1982) in affirming a district court grant of an employer's motion for j.n.o.v. There, the Eighth Circuit said that "(t)he court should grant a motion for judgment n.o.v. if, without weighing the witness' credibility, only one reasonable conclusion follows from the evidence presented." Petitioner cites Jackson v. Shell Oil Co., 702 F.2d 197 (9th Cir. 1983) in which the Ninth Circuit affirmed the district court's

denial of the defendant's motion j.n.o.v. The court said that "'(t)he standard is whether, when viewing the record as a whole, there is substantial evidence present that would support a finding, by reasonable jurors, for the non-moving party,'" pointing out that "'(s)ubstantial evidence is more than a mere scintilla,'" and that "'(i)t must be evidence that a reasonable mind could accept as adequate to support a conclusion'" when "'examined in a light most favorable to the prevailing party.'" 702 F.2d at 200. Petitioner also cites the case of Sweat v. Miller Brewing Co., 708 F.2d 655 (11th Cir. 1983). That case is hardly applicable here since it involved the denial of a summary judgment motion. As the Eleventh Circuit correctly said, the question involved in a motion for summary judgment "is whether there is a genuine issue of material fact." Such a motion, of course, involves Rule 56 of the Federal Rules of Civil Procedure and not Rule 50.

Petitioner attempts to fashion a conflict between the above cases and those of the Fourth and Fifth Circuit. Petitioner cites Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1982) in which the Court affirmed the district court's grant of a j.n.o.v. The Fourth Circuit said that "(t)hough it is axiomatic that in ruling on this motion, courts are to consider the evidence in the light and with all inferences most favorable to the party opposing the motion, they should do so on the basis of all the evidence, not just that favorable to the non-mover." 681 F.2d at 243, n. 14. The court cites Grooms v. Minute-Maid, 267 F.2d 541, 543 (4th Cir. 1959); Simblest v. Maynard, 427 F.2d 1, 4 (2d Cir. 1970); and Boeing Co. v. Shipman, 411 F.2d 365, 374-375 (5th Cir. 1969) (en banc). Petitioner cites Smith v. Flax, 618 F.2d 1062 (4th Cir. 1980), in which the Fourth Circuit affirmed a district court grant of a defendant's motion j.n.o.v. or for a new trial. In so doing, the Court said "(o)f course, the

question should not be taken from the jury if there is evidence in the case which, if accepted by the jury, would support a finding that age was a determining factor in the discharge, but we conclude that there is insufficient evidence to support such a finding in this case." 618 F.2d at 1066. Finally, in his search for a conflict, the petitioner cites the case of Massarsky v. General Motors Corp., 706 F.2d 111 (3d Cir. 1983) in which the Third Circuit affirmed the trial court's denial of the plaintiff's motions for a j.n.o.v. and for a new trial. As to granting a j.n.o.v. the court said the following:

> "On motions for a directed verdict and for judgment notwithstanding the verdict, the movant must meet a strict test. These motions require the judge 'to test the value of evidence not for its insufficiency to support a finding, but rather for its overwhelming effect. He must be able to say not only that there is sufficient evidence to support the finding, even though other evidence could support as well a contrary finding, but additionally that there is insufficient evidence for permitting any different finding.' Fireman's Fund Ins. Co. v. Videfreez Corp., supra, 540 F.2d at 1177 (quoting Mihalchak v. American Dredging Co., 266 F.2d 875,

877 [3d Cir.], cert. denied, 361 U.S. 901, 80 S. Ct. 209, 4 L.Ed.2d 157 [1959])." 706 F.2d at 119.

The Fifth Circuit's standard for reviewing a trial court's grant of a j.n.o.v. was set forth in Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969). The court said that "(o)n motions for directed verdict and for judgment notwithstanding the verdict the court shall consider all the evidence--not just the evidence which supports the non-mover's case--but in the light and with all reasonable inferences most favorable to the party opposed to the motion" and that "(i)f the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper." 411 F.2d at 374. The Fifth Circuit, however, made it clear that "if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the

exercise of impartial judgment might reach difference conclusions, the motions should be denied, and the case submitted to the jury," indicating that "(a) mere scintilla of evidence is insufficient to present a question for the jury." Id. The Fifth Circuit said that, in order to create a jury question, "(t)here must be a conflict in substantial evidence" but was quick to point out that "it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses."

Thus, a reading of the standards set forth in the above cases abundantly demonstrates that there is no real conflict between the circuits on the standard to be used in granting a j.n.o.v. All Circuits place a heavy burden upon the moving party and all require a determination as to whether the evidence is so strongly in favor of one party that reasonable persons on a jury could not arrive at a

contrary verdict. The reasonableness standard weaves a common thread throughout all of the opinions of the circuits on this subject.

To adopt the petitioner's petition that the Fifth Circuit's ruling in the instant case subverts the right to a jury trial provided under the Age Discrimination in Employment Act, would require this Court to find that Rule 50(b) does not apply to cases under that Act. Nothing in the statute itself or its legislative history warrants such a conclusion.

As to the alleged violation of the Seventh Amendment, raised for the first time in these proceedings, this Court long ago ruled that "Rule 50(b) does not violate the Seventh Amendment's guarantee of a jury trial." Neely v. Eby Constr. Co., 386 U.S. 317, 18 L.Ed.2d 75, 80, 87 S.Ct. 1072 (1967); Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 85 L.Ed. 147, 61 S.Ct. 189 (1940).

2. The Decision Below Affirming a Judgment Notwithstanding the Verdict Does not Conflict with Decisions of Other Courts of Appeals and Applicable Decisions of this Court, and does not Violate the Seventh Amendment as it Pertains to Rule 50(b) of the Federal Rules of Civil Procedure.

Notwithstanding the petitioner's assertion to the contrary, the courts of appeals are not sharply divided on the question of the procedure outlined in Rule 50(b) of the Federal Rules of Civil Procedure as it pertains to the moving for a directed verdict at the close of all the evidence as a predicate to the making of a motion for a judgment notwithstanding the verdict.

In the instant case the defendants/respondents moved for a directed verdict at the close of the plaintiff's case. Through cross-examination of the plaintiff's witnesses, the defendants had significantly discredited their testimony and the plaintiff had otherwise failed to establish a prima facie case. The judge indicated that he thought the plaintiff's case was extremely weak, especially after listening

to a tape recording of the final meeting between the plaintiff and representatives of the defendants wherein plaintiff indicated his unwillingness to conform to company policies and directions. The judge indicated his agreement with defendants, but indicated his concern for taking the matter away from the jury at that point. Defendants then asked the judge to reserve his ruling. The judge then instructed the defendants that he would reserve his ruling and that they could again attack the sufficiency of the plaintiff's evidence "by motion for judgment n.o.v. or motion at the close of the evidence." Thereafter, defendants presented substantial evidence in support of their case. While it is true that the plaintiff presented additional testimony, it did not serve to rebut the evidence presented by the defendants and was merely repetitious of that which was presented in the plaintiff's case in chief; thus, the Fifth Circuit's comment that the plaintiff offered no rebuttal.

The sum of all of this was that the plaintiff's case was even weaker at the close of the trial than it was at the close of plaintiff's case. Given the court's indication of his desire to allow the jury to decide the case, that he would reserve his ruling on defendants' motion for directed verdict, and his instruction that the defendants had the choice of renewing their motion either at the close of the evidence or in the form of a motion for j.n.o.v., defendants believed that they had done all that was necessary to lay the predicate for a motion j.n.o.v.

One of the cases cited by the petitioner to demonstrate a so-called inflexible approach is that of Martinez Moll v. Levitt & Sons of Puerto Rico, Inc., 583 F.2d 565 (1st Cir. 1978). In that case the defendant failed to make any motion for a directed verdict at any time during the trial. Although the First Circuit refused to consider the issue of sufficiency of the evidence on review it

recognized that "(t)he most that this and other courts have done by way of relaxing the rule [50(b)] is to accept something less than full compliance where substantial compliance was shown." (Emphasis added). 583 F.2d 569. The First Circuit cited its decision in Bayamon Thom McAn, Inc. v. Miranda, 409 F.2d 968 (1st Cir. 1969) as an example of how it had accepted substantial compliance where, as here, the defendants moved for a directed verdict on grounds of insufficiency of the end of the plaintiffs' case, but did not review the motion at the close of all the evidence and the district court expressly reserved ruling on the earlier motion.

Petitioner cites the case of DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193 (3d Cir. 1978) in which the Third Circuit affirmed a district court's denial of the defendants' motion for j.n.o.v. because of failure to make a motion at the close of the evidence but remanded the case for a new trial. The Third

Circuit, nevertheless, recognized that there might be situations where a j.n.o.v. could be sustained within the discretion of the trial court despite the failure of counsel to completely comply with Rule 50(b). Lowenstein v. Pepsi-Cola Bottling Co. of Pennsauken, 536 F.2d 9, 11, n. 5 (3d Cir. 1976); Psinakis v. Psinakis, 221 F.2d 418, 422 (3d Cir. 1955).

Another so-called inflexible court, the Second Circuit, is cited by the petitioner in the case of Olivares v. American Export Isbrandtsen Lines, Inc., 431 F.2d 814 (2d Cir. 1970). In that case the court ruled that the plaintiff was not entitled to have an appellate court order a trial court, which had entered a judgment for the defendant, to enter a judgment for the plaintiff where the plaintiff had not moved for a directed verdict under either Rule 50(a) or Rule 50(b). But the court granted a new trial on the basis that "where the undisputed evidence results in a verdict that is totally without legal support justice

requires a new trial despite counsel's failure to move for a directed verdict prior to submission of the case to the jury." 431 F.2d at 817, citing Johnson v. New York New Haven and Hartford R.R. Co., 344 U.S. 48, 73 S.Ct. 125, 97 L.Ed. 77 (1952). The court said "(t)o rule that an unintended flaw in procedure bars a deserving litigant from any relief is an unwarranted triumph of form over substance, the kind of triumph which, commonplace enough prior to our more enlightened days, we strive now to avoid whenever possible." 431 F.2d at 817. The Second Circuit has also held that it would take a similar position in a Rule 50(b) case where a motion was not made at the close of the evidence where "a manifest injustice" would otherwise occur since the verdict was "wholly without legal support." Sojax v. Hudson Water Ways Corp., 590 F.2d 53, 54-55 (2d Cir. 1978).

The above, then, are the so-called inflexible circuits. As can be seen, they are hardly inflexible in that each of them is willing to

accept something other than complete compliance with Rule 50(b). Other circuits, of course, take the same approach. The Fourth Circuit, for example, in Miller v. Premier Corp., 608 F.2d 973 (4th Cir. 1979) considered on appeal the question of the sufficiency of the evidence in a case notwithstanding the failure of a party to make a motion for directed verdict at the close of the evidence because the "colloquy between court and counsel" was "too confusing to permit confident assessment" and that fairness dictated that the court consider the sufficiency of the evidence. In Bonner v. Coughlin, 657 F.2d 931 (7th Cir. 1981), cited by petitioner, the Seventh Circuit said that "(i)t is certainly the better and safer practice to renew the motion for directed verdict at the close of all the evidence, but '(t)he application of Rule 50(b) in any case "should be examined in the light of the accomplishment of [its] particular purpose as well as in the general context of securing a fair trial for

all concerned in the quest for truth."'" In that case the defendant had moved for a verdict at the close of the plaintiff's case, which was not renewed at the close of all of the evidence, and the trial judge reserved its ruling on the earlier motion. In Bachtel v. Mammoth Bulk Carriers, Ltd., 605 F.2d 438 (9th Cir. 1979), vacated and remanded on other grounds, 451 U.S. 978, 68 L.Ed.2d 835, 101 S.Ct. 2301 (1981), cited by petitioner, there was no motion for a directed verdict by the defendant either at the close of the plaintiff's case or at the close of all the evidence. The defendant did request an instruction by the court to return a verdict in its favor. The Ninth Circuit found that there was substantial compliance with Rule 50(b). In another case cited by the petitioner, Splitt v. Deltona Corp., 662 F.2d 1142 (5th Cir. 1981), the court found compliance with Rule 50(b) to lay a predicate for a motion j.n.o.v. notwithstanding a failure to move for a directed verdict, where, as here,

the judge's comments indicated that "he believed a proper predicate for a judgment notwithstanding the verdict had been laid" by his reference to the right of defendants to file a j.n.o.v. after trial. Other courts have ruled similarly. U.S. v. 353 Cases, 247 F.2d 473 (8th Cir. 1957); Quinn v. Southwest Wood Products, Inc., 597 F.2d 1018 (5th Cir. 1979); Moran v. Raymond Corp., 487 F.2d 1008 (7th Cir. 1973); Lancaster v. Foster, 260 F. 5 (5th Cir. 1918), cert. denied, 249 U.S. 601, 63 L.Ed. 796, 39 S.Ct. 259 (1919).

The Second Circuit, which the petitioner attempts to fashion as an inflexible court, has held, that, in a situation such as that at bar, the judge was technically in error in reserving the case as he did, but noted that "(t)he court may have well led counsel reasonably to believe that all had been done that was necessary." Bayamon Thom McAn, Inc. v. Miranda, supra 409 F.2d at 970.

Thus, it can be seen that, the sum of these rulings is that all of the circuits require adherence to Rule 50(b) and none totally disregards the rule. But each in its own way accepts something less than complete compliance with the rule, all in the interest of justice and consistent with Rule 1 of the Federal Rules of Civil Procedure that those rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." Thus, there is no conflict among the circuits on this issue.

Petitioner has cited no case in which the rulings below conflict with a ruling of this court. The only decision of this court which he cites is that of Johnson v. New York, New Haven and Hartford R.R. Co., supra, in which this court held that, where a party makes a motion for directed verdict which is reserved by the court, the trial court cannot enter a judgment in his favor after an adverse verdict unless the verdict loser files a timely motion

for judgment notwithstanding the verdict. In that case a motion to set aside the verdict and a motion for a new trial were filed but not a motion j.n.o.v. This Court noted that neither the court of appeals nor the trial court treated the motion to set aside the verdict as a motion j.n.o.v. 97 L.Ed. at 82. That, of course, is not the situation in this case. There is, therefore, no conflict between the decisions of the courts below and those of this Honorable Court.

3. The Petition Raises Issues Not Raised Below.

The petitioner raises several issues which were not raised in the courts below, and, therefore, should not be considered by this Honorable Court. The petitioner did not allege that the granting of the judgment notwithstanding the verdict by the trial court was in violation of the Seventh Amendment of the Constitution of the United States nor that it was violative of the Age Discrimination in Employment Act. Neither of these issues was

raised before the trial court or the Fifth Circuit Court of Appeals.

In addition, the petitioner did not raise the procedural issue discussed above with respect to Rule 50(b) of the Federal Rules of Civil Procedure before the trial court at the time he opposed the respondents' motion j.n.o.v. This factor was pointed out by the respondents to the Fifth Circuit, but was not discussed by the court in its opinion.

It is axiomatic that "(a) party cannot raise a new theory on appeal that was not presented to the court below." Capps v. Humble Oil and Refining Co., 536 F.2d 80, 82 (5th Cir. 1976), citing Wolf v. Frank, 477 F.2d 467 (5th Cir. 1976), cert. denied 414 U.S. 975, 38 L.Ed.2d 218, 94 S.Ct. 287 (1973) and Autrey v. Williams & Dunlap, 343 F.2d 730 (5th Cir. 1965). See also Halsell v. Kimberly-Clark Corp., 683 F.2d 285, 294-295 (8th Cir. 1982) and Moran v. Raymond Corp., 484 F.2d 1008, 1011 (7th Cir. 1973), cert. denied, 415 U.S. 932, 39

L.Ed.2d 490, 94 S.Ct. 1445 (1974). This court has steadfastly held to a similar rule. Brown v. Socialist Workers '74 Campaign Committee (Ohio), ___ U.S. ___, 74 L.Ed.2d 250, 264, 103 S.Ct. ____ (1982); United States v. Mitchell, 445 U.S. 535, 546, n. 7, 63 L.Ed.2d 607, 618, n. 7, 100 S.Ct. 1349 (1980); Adickes v. Kress & Co., 398 U.S. 144, 147, n. 2, 26 L.Ed.2d 142, 148, n. 2, 90 S.Ct. 1598 (1970); Lawn v. United States, 355 U.S. 339, 362-363, n. 16, 2 L.Ed.2d 321, 337, n. 16, 78 S.Ct. 311 (1958); California v. Taylor, 353 U.S. 553, 557, n. 2, 1 L.Ed.2d 1034, 1037, n. 2, 77 S.Ct. 1037 (1957); Husty v. United States, 282 U.S. 697, 701-702, 75 L.Ed. 629, 633, 51 S.Ct. 240 (1931); Duignan v. United States, 274 U.S. 195, 200, 71 L.Ed. 996, 1001, 47 S.Ct. 466 (1927).

Thus, the respondents urge this Honorable Court to decline to consider the issues raised by the petitioner in that they were not raised in the courts below and were thus waived.

4. Only Questions of Evidence and Factual Findings are Involved

By his petition, the petitioner is merely seeking a reevaluation by this court of the evidence and the findings of fact. Respondents do not shrink from such an analysis since it is abundantly clear from the record that the evidence is overwhelmingly in favor of the respondents. To establish a prima facie case of discharge by reason of age discrimination the plaintiff must establish the following:

> "(1) The employee's membership in the protected group; (2) his discharge; (3) His replacement with a person outside the protected group; and (4) his ability to do the job. (Marshall v. Goodyear Tire and Rubber Co., 554 F.2d 730, 15 F.E.P. Cases 139 [5th Cir. 1977]; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817, 5 F.E.P. Cases 965 [1973])."

The record is replete with evidence that the plaintiff not only failed and refused to follow the instructions and directions of his superiors, but that in many ways he was not qualified for this job which was far more complex than that which he held previously with the smaller Texas Hosiery Company. Thus, it is clear that

plaintiff failed even to establish a prima face case.

Review of the evidence, of course, is not appropriate here. This court has said "(w)e do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227, 69 L.Ed. 925, 926 (1925).

Thus, respondents urge that this court deny the petition for certiorari as an attempt by petitioner to secure a review of the evidence by the court.

CONCLUSION

For all of the above stated reasons, respondents believe that this court should deny the petition for writ of certiorari and respectfully request this court to so rule.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

January 18, 1984

No. 83-1017

UNITED STATES SUPREME COURT

October Term 1983

PAUL BOHRER,

Petitioner,

v.

HANES CORPORATION, et al.,

Respondents.

REPLY OF PETITIONER TO BRIEF OF RESPONDENTS IN OPPOSITION

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UNITED STATES SUPREME COURT

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PAUL BOHRER,	)
	)
Petitioner,	)
	)
v.	)
	)
HANES CORPORATION, et al.,	)
	)
Respondents.	)

REPLY OF PETITIONER TO BRIEF OF RESPONDENTS IN OPPOSITION

Petitioner Paul Bohrer submits this reply solely to address respondents' argument that the petition raises issues which were not raised in the courts below. That argument is incorrect and thus offers no basis for denying the petition.

First, respondents say that the constitutional and statutory propriety of granting a judgment notwithstanding the verdict was not raised in the courts below. Brief of Respondents, pp. 26-27.

That assertion is demonstrably false. Petitioner's opening brief and reply brief in the Fifth Circuit explicitly rely upon the petitioner's right to a jury trial under the Seventh Amendment as a rationale for reversing the trial court's judgment. E.g., Brief for Appellant, pp. ii, 18, 34, 35; Reply Brief for Appellant, pp. 4, 8, 14. Likewise, petitioner's post-verdict brief in the trial court relies explicitly on the Seventh Amendment on pages 16 and 29 and refers to his right to a trial by jury on page 23. For respondents to assert in this Court that the substantive jury trial issue was not raised in the courts below is, to be most charitable, inaccurate.[1]

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[1]The fact that neither the Fifth Circuit nor the district court dealt with petitioner's jury trial argument shows the inattentive manner in which those courts applied Rule 50 of the Federal Rules of Civil Procedure to this case and [cont'd]

Second, respondents say that petitioner did not raise the Rule 50 procedural issue in the trial court. Brief of Respondents, p. 27. What respondents fail to tell this Court, however, is that the only issue they raised following the verdict against them was "[w]hether the jury verdict in the instant case was contrary to the clear weight of the evidence so as to warrant a judgment in favor of defendants notwithstanding the verdict or, in the alternative, a new trial." Brief in Support of Defendants' Motion, etc., p. 4. Because the respondents contested only the weight and not the sufficiency of the evidence supporting the verdict, there was no need to argue any procedural issue under Rule 50. Out of an abundance of caution,

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highlights the need for this Court to address the proper application of this jury control device to findings of unlawful motivation.

however, petitioner's post-trial submission urged that neither a new trial motion nor a judgment notwithstanding the verdict should be granted. After the trial court surprisingly entered a judgment notwithstanding the verdict (instead of granting a new trial motion addressed to the weight of the evidence), petitioners raised at the first opportunity in the Fifth Circuit the propriety of granting a judgment notwithstanding the verdict in the absence of a motion for a directed verdict at the close of the evidence. Thus, it is misleading in the extreme for respondents to suggest to this Court that the procedural issue was not raised below. That issue was fully briefed by the parties in the court of appeals; the court of appeals explicitly determined the issue; and the issue is properly before this Court.

Absent the incorrect assertions about

what issues were raised in the courts below, respondents' opposition to the petition would not have merited a reply. In view of the lack of a forthright response to the petition and the importance of both the procedural and substantive issues raised by the petition, petitioner has deemed it necessary to demonstrate that this case is an appropriate vehicle for resolving both of these pressing issues. This Court should therefore issue a writ of certiorari to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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